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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., *Petitioners,*

v.

JOHN AGNEW, F. O. FAYERWEATHER.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Solicitor General, on behalf of the Board of Governors of the Federal Reserve System, Marriner S. Eccles, Chairman of said Board, Ronald Ransom, M. S. Szymczak, John K. McKee, Ernest G. Draper and Rudolph M. Evans, members of said Board, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on February 13, 1946.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 29-44) is not yet reported. No opinion was rendered in the United States District Court for the District of Columbia.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 13, 1946. (R. 45). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

(1) Is there a right of judicial review of the Board's action, under Section 30 of the Banking Act of 1933, as amended (12 U. S. C. § 77), in ordering respondents' removal as directors of The Paterson National Bank, Paterson, New Jersey?

(2) If so, did the Board err in holding that respondents were employed by a firm "primarily engaged" in the underwriting business, within the meaning of Section 32 of the Banking Act of 1933, as amended (12 U. S. C. § 78)?[1]

STATUTES INVOLVED.

Section 30 of the Banking Act of 1933, c. 89, 48 Stat. 162, 193, as amended (12 U. S. C. § 77), provides as follows:

"SEC. 30. Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a

[1] In case certiorari is granted petitioners reserve the right to argue that the suit is in substance one against the United States without the consent of Congress and that, even assuming reviewability otherwise, an injunction suit against the Board and its members is an inappropriate remedy.

national bank, or of a bank or trust company doing business in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board of Governors of the Federal Reserve System may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided*, That such order and the findings of fact upon which it is based shall

not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court.

Section 32, as amended (12 U. S. C. § 78), provides:

SEC. 32. No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.

STATEMENT.

On March 23, 1945, the Board of Governors of the Federal Reserve System (hereinafter referred to as the Board) issued an order removing respondents as directors of The Paterson National Bank, Paterson, New Jersey (hereinafter referred to as the Bank). The order was issued pursuant to authority conferred upon the Board by Section 30 of the Banking Act of 1933, 48 Stat. 193 (12 U. S. C. § 77), which provides, *inter alia*, that if, following a hearing, the Board finds that

an officer or director of a national bank has continued to violate any law relating to such bank after having been warned by the Comptroller of the Currency to discontinue such violation, the Board in its discretion may order that such officer or director be removed from office. (R. 9-10.) The finding upon which the Board's order in this case was made was that respondents had continued to violate Section 32 of the Banking Act of 1933, as amended (12 U. S. C. § 78), after having been warned by the Comptroller of the Currency to discontinue such violation (R. 16). Section 32 prohibits any officer, director or employee of any company, partnership or individual "primarily engaged" in the "underwriting" business from serving at the same time as an officer, director or employee of a national bank.

The facts respecting respondents' employer are not in dispute. The Board, after hearing, found that Eastman, Dillon & Co. is engaged in the general brokerage and securities business with its principal place of business in the City of New York; that it advertises and holds itself out to the public as "Underwriters, Distributors, Dealers and Brokers"; that it acts as broker or principal in executing orders on the New York Stock Exchange, the New York Curb Exchange and the Philadelphia Exchange; that it buys and sells securities as broker or principal at wholesale or retail; that over an indefinite period the transactions of the firm in the "underwriting" field amounted to about 15 per cent of the total market value of the securities that were bought and sold by the firm during the same period; that the total number of its underwriting transactions during the same period approximated a similar percentage (15%) of the total number of the firm's transactions; that for the fiscal year ending February 28, 1943, 26 per cent of the firm's gross income was derived from its

underwriting business, while 42 per cent of its gross income was derived from its brokerage business; that for the year ending February 29, 1944, 32 per cent of the firm's gross income was derived from its underwriting business, while 47 per cent of its gross income was derived from its brokerage business; that during 1943 the firm ranked ninth among 94 leading investment companies of the country with respect to its participations in bond underwritings; that for a period during such year it ranked first among such underwriters, excluding participations in municipal and railroad financings; and that the firm's participations in underwritings during 1943 amounted to $14,657,000. (R. 13-16.)

In their original complaint respondents named only the Board as defendant, praying that a writ of certiorari issue to the Board to determine whether the Board "had jurisdiction and authority" to make the removal order. (R. 7) They subsequently amended their complaint by adding the individual members of the Board as defendants and praying for alternative relief—asking either for the issuance of a writ of certiorari to the Board or for a mandatory injunction against the Board and its members requiring them "to vacate and set aside" the removal order. (R. 23-24)

Petitioners moved to dismiss the complaint on the grounds that the court lacked jurisdiction of the subject matter and that the complaint otherwise failed to sate a claim upon which relief could be granted (R. 25). The District Court dismissed the action, without opinion (R. 26-27). On appeal, the court below reversed, one judge dissenting (R. 29-44).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the District of Columbia erred:

(1) In holding that the District Court had jurisdiction in the circumstances of this case to review the correctness of the Board's interpretation of the words "primarily engaged" within the meaning of Section 32 of the Banking Act of 1933.

(2) In holding that such jurisdiction, if it existed, could be exercised in a suit for injunction against the Board and its members.

(3) In holding that the interpretation placed upon the words "primarily engaged" by the Board was erroneous.

(4) In failing to hold the suit one against the United States without the consent of Congress.

(5) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

This case presents, for the first time in the courts, an important question concerning the extent, if any, of judicial review of the administrative orders of the Board of Governors of the Federal Reserve System in administering the Federal banking statutes which are within the ambit of its jurisdiction. It also presents a question of considerable importance (also a matter of first impression in the courts) to the administration of Section 30 of the Banking Act of 1933.

(1) The first issue is whether respondents, notwithstanding the absence of any express statutory provision therefor, nonetheless are entitled to a right of judicial review of the Board's order removing them as directors

of the Bank. The court below answered this question in the affirmative, holding in substance that, inasmuch as the Board's order is predicated upon a construction of law, the content of that law is a matter for judicial determination. The effect of this ruling is to permit a public inquiry into the facts of each proceeding which may hereafter be held by the Board under Section 30. Such a result, if permitted to stand, may nullify the effectiveness of such proceedings in the bank supervisory scheme and seems contrary to the Congressional intent.

The bank-depositor relationship is delicately hinged upon the confidence of the public. Mere rumor can seriously impair that confidence. The Federal bank supervisory statutes are all geared to this truth. In none of them is there to be found any provisions for judicial review of the highly confidential orders and recommendations which grow out of the examining process. The same principle is involved in Section 30 proceedings, which permit removal of officers and directors upon findings either that particular directors have continued "unsafe and unsound practices" or that they have continued "to violate any law relating to such bank". The impact of a mere charge of the first type, if publicized, may be sufficient in a critical time to destroy a bank, and the reviewability of the two types of findings is obviously the same. Section 30 itself contains specific recognition of this danger. It provides that the Board's order of removal, together with the findings of fact upon which it is based "shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section".

The decision below encourages the publicity which the statute forbids.

We believe that in this statutory setting the absence of an express provision for judicial review should be read as manifesting a Congressional intent that there be no review. In *Estep* v. *United States*, No. 292, this Term, this Court recently stated that

> * * * Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. *Switchmen's Union* v. *Mediation Board*, 320 U. S. 297, 301. And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses. * * *

Much more clearly here than in the Railway Labor Act has Congress indicated that administrative proceedings in the field of banking—and particularly under Section 30—should not be reviewable in court.[2] For here the explicit prohibition against disclosures of the Board's orders "to anyone", except in an enforcement proceeding,[3] would be meaningless if such matters could be submitted in all instances to the courts.

The Railway Labor Act contained no such express manifestations of legislative intention. Nevertheless, in *Switchmen's Union* v. *National Mediation Board*,

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[2] The courts have also been reluctant to interfere with the administrative regulation of the banking system. *Adams* v. *Nagle*, 303 U. S. 532, 541, 542; *Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 673; *Bushnell* v. *Leland*, 164 U. S. 684; *Apfel* v. *Mellon*, 33 F. 2d 805 (App. D. C.), certiorari denied, 280 U. S. 585; *Cooper* v. *Woodin*, 72 F. 2d 179 (App. D. C.); *United States Savings Bank* v. *Morgenthau*, 85 F. 2d 811 (App. D. C.), certiorari denied, 299 U. S. 605; *Lucking* v. *Delano*, 122 F. 2d 21 (App. D. C.), *Liberty National Bank* v. *McIntosh*, 16 F. 2d 906 (C. C. A. 4).

[3] It is unnecessary to determine in this case whether or to what extent a defendant in a criminal proceeding may assert that the Board has erred as a matter of law.

320 U. S. 297, the Court held that even an administrative decision on a question of law could not be reviewed on the ground that the statutory scheme showed that no judicial review was intended. There is, of course, no constitutional requirement that respondent obtain judicial review in equity, in advance of a criminal proceeding[1] to enforce the administrative order. *Cf. Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49, and cases cited. And respondent's retention of their bank directorships was clearly subject to any qualification, including any relating to the procedure for reviewability, which Congress may legitimately impose.

2. If the administrative decision is reviewable, the issue presented on the merits, which concerns the proper interpretation of the words "primarily engaged" as used in Section 32, is of great public importance in the administration of that section and Section 30.

Whether that phrase only applies to firms 51% of whose business is "underwriting" is a basic question of interpretation which will recur in the future from time to time as the boards of directors of national and member banks are changed or reconstituted.

The majority opinion held, in substance, that respondents' employers were not "primarily engaged" in the underwriting business because the volume of their brokerage business exceeded the volume of their underwriting business. The effect of this ruling would be to permit an employee of the largest—or the ninth largest—underwriting firm in the country to serve as a director of a national or member bank if 51% of the business of his employer was brokerage, and 49% underwriting. *Per contra*, an employee of a firm doing an insignifi-

[1] It is not alleged that criminal action has been threatened.

cant amount of underwriting could not serve as a bank director if the firm had even smaller quantities of other business. Such a construction, as emphasized in the dissenting opinion of Judge Edgerton, is "irrational" and does violence to the obvious Congressional intent to remove from bank directorates one, who by his affiliation with organizations essentially or fundamentally engaged in underwriting activities, may be tempted to "exert influence upon his bank or its customers in favor of that business". As Judge Edgerton further pointed out, whether a director may yield to such a temptation "does not depend in any degree upon the question whether the underwriting business is 51 per cent or 49 per cent of the business in which he is interested".

The Board's construction of the words "primarily engaged" gives effect to the general purpose of the statute emphasized above by Judge Edgerton. Further, it does so without distorting the literal meaning of the words. Although it is true that the word "primarily" may mean "firstly" or "chiefly", respectable dictionaries[5] also define it as meaning "essentially" and "fundamentally". These words connote substantiality, and not mere proportional priority. Clearly a word having slightly variant meanings should be given the only one which is consistent with the underlying purpose of the statute.

The Board's construction is not only in harmony with the objectives of the legislation, but is relatively definite in application, in contrast to the concept imposed by the court below. The latter would apply and reverse the application of the statute just as often as the percentage ratios beween the underwriting and other business of

[5] Funk & Wagnalls, New Standard Dictionary; Webster's New International Dictionary.

an employer fluctuated sufficiently to make first one and then another the greatest in volume. For that reason review of the decision is of additional importance to the administration of Sections 30 and 32. Clearly, if the decision below is permitted to stand it will frustrate the Congressional purpose by permitting large underwriting concerns to escape from the statutory prohibition.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

GEORGE B. VEST,
General Counsel,
Board of Governors,
Federal Reserve System.

March, 1946.